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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POILS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,
Petitioners,

vs.

THE UNITED STATES

REPLY FOR PETITIONERS

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THE UNITED STATES

BRIEF FOR PETITIONERS

History and Jurisdiction

The opinion below has not been officially reported. Jurisdiction is invoked under Section 3 (b) of Act approved February 13, 1925 (43 Stat. 939). Judgment below April 16, 1928 (R. p. 66). Rehearing denied October 22, 1928 (R. p. 67). Petition for certiorari presented December 4,

1928, and granted January 21, 1929. Jurisdiction sustained by Hamilton Brown Shoe Co. v. Wolf Bros. Co. (240 U. S. 251) and Magnum Import Company v. Coty (262 U. S. 159).

This case arises under Senate Bill 3185, 69th Congress, 1st Session, as an existing law (R. 1.pp. 6-7). This act, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," passed by both Houses of Congress, signed by the presiding officers thereof and attested as by law required, was, on June 24, 1926, presented to the President (R. p. 7). Eight days thereafter (Sundays excepted) on July 3, 1926, there was an adjournment of the first session of that Congress for the usual summer recess. December 6, 1926, the same Congress reconvened from recess in second session, and resumed its legislative business. The President did not approve the bill so presented to him; he did not deposit it with the Secretary of State as a law; he did not return the bill with objections to that House where it originated within ten days or at all (R. p. 6). The legislation was simply ignored, or "pocket vetoed."

The Petitioners claimed in the court below that the said jurisdictional act became a law, conferring jurisdiction on the Court of Claims to hear the claims set forth in the petition, by reason of the failure of the Executive to act within the ten days prescribed by the Constitution (Last par., Clause 2, Section 7, Article I U. S. Constitution). Defendant's demurrer challenged the alleged status of the bill as an existing law because the Congress had adjourned for summer recess within said ten days.

The Court below held that the bill was not a law, because of said adjournment, and sustained the demurrer.

Statement of the Case

The present case thus involves an original construction of the Constitution. There are no decisions of a Federal Court directly bearing on the question, except in the case at bar, and there exists a present difference of construction and conflict between the Executive and the Legislative Branches of the Government with respect to the correct interpretation of the language contained in the concluding sentence of the so-called veto provisions of the Constitution. The legal question involved is, therefore, of importance far beyond the present case.

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall entered on the Journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

The Question Involved

It is conceded and obvious that, under the language last quoted, bills presented to the President within ten days of the final adjournment of the Congress do not become laws unless signed by the President, for such final adjournment precludes any further return or reconsideration of the legislation. The question here is: Whether a temporary adjournment of the Congress, other than this final adjournment terminating the legislative existence of the Congress that passed the bill, existing at the expiration of the ten days allotted the President for his consideration thereof, prevents his return of the bill so that it then fails to become a law under the quoted language of the Constitution.

The Precise Question

The precise question therefore is whether the adjournment of the 69th Congress for customary summer recess on July 3, 1926—eight days after the bill, S. 3185, was presented to the President—prevented the President's return of the bill within ten days to the House in which it originated, within the meaning and intent of the language of the exception clause of the Constitution, reading:

"Unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

Attention is directed to the fact that the exception is not adjournment, but prevention of its return by adjournment.

Assignments of Error to be Urged

1. The Court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of

the Constitution, in the light of contemporary history.

2. The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with its words and sense and would enforce and protect such purpose.

4. The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.

5. The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.

6. The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

8. The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.

9. The court below erred in the absence of decisions by this or other Federal courts in not giving due consideration to the construction of identical or similar language in State constitutions by the highest courts of such States.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right

of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President, with his objections.

ARGUMENT

Summary

Each Congress is a single entity. Ten day provision may be construed as either ten legislative or calendar days. Distinction between adjournments other than final solely one of duration and nomenclature. Only exception is where return is prevented. When House of origin is in adjournment but the other House is not, return must be made to proper representatives of the House in adjournment. If return can properly be made in that case, it can be properly made in every case before final adjournment of the Congress. President must return bill with objections if possible. Purpose of return provision defeated by pocket veto. Duty and ability of the President to return bill with objections not affected by intermediate adjournments. Return of bill with objections necessary to provide opportunity for reconsideration. State constitutional precedents support petitioner's contention. The lower court held, in effect, that any adjournment may prevent return. If Constitution meant this it would have so stated in plain terms. The lower court held, in effect, that Congress by its adjournment forfeited all right to reconsider, thereby giving the President an absolute veto power wholly contrary to the policy, purpose and intent of the framers of the Constitution and the letter and spirit of that instrument. President's sole power is limited to suggesting revision of legislation.

Executive precedents contrary to policy, spirit and intent of Constitution and in derrogation of other Constitutional powers not compelling authority. Precedents cannot abrogate provisions of the Constitution. Practice of pocket veto outgrowth of mistaken conceptions as to nature of the Congress and character of its sittings. Executive precedents not unanimous. Present asserted right of pocket veto applicable to all adjournments and is contrary to policy, intent, purpose and plain language of the Constitution. The [redacted]ability to return should be held as equivalent to and co-existent with the power of Congress to thereafter legislatively consider the bill and objections thereto. Results of adopting construction of lower court violate the obvious purpose and intent of the Constitution regarding legislation, as conclusively demonstrated by a consideration of the errors assigned.

The Law and the Pertinent Facts

The case as outlined presents but a single problem of constitutional construction. The assignments of error all relate to the proper method, the proper aids, and the proper tests by which correct constitutional construction may be attained, and whereby an incorrect construction may be detected and rejected, and the correct construction confirmed and adopted.

As material considerations to be held in mind in construing the quoted language, and in preliminary argument exhibiting the points of law raised, petitioners here urge:

1. **Each Congress is a single entity and its sessions have one practical unity.**

The difference between a recess over a holiday, and longer recess by the adjournment between so-called ses-

sions of the same Congress, is one of nomenclature and duration and not of substance, for there is no change in the status of legislative business. Bills referred to conference at one session can be reported to Congress at the next, and even where one House asks for a conference at one session, the other House can agree to it at the next session with no further action by the other branch. Finally, bills enrolled and signed by the presiding officers of the two Houses at the close of a session have been sent to the President and approved at the beginning of the next session. (See also Constitution, Jefferson's Manual and Rules of the House of Representatives, 69th Congress, Second Session, p. 401)

The following rules and practices of the House which originated in 1818 are illustrative of the single entity and unity of the two sessions of the Congress:

The Journal of a day of the previous session may even be amended at a succeeding session of the Congress. (Hind's Precedents, Vol. IV., Sec. 2744.) A motion to reconsider when once entered may remain pending indefinitely, even until a succeeding session of the same Congress. (Id. Vol. V., Sec. 5684.)

One House having asked for a conference at one session, the other House may agree to the conference at the next session of the Congress. (Id. Vol. V., Sec. 6286.)

The power of a conference committee of one session, that has not reported, does not expire by reason of the termination of a session, unless it be the last session. (Id. Vol. V., Secs. 6260-6262.)

Enrolled bills pending at the close of a session were at the next session of the same Congress ordered to be treated as if no adjournment had taken place. (Id. Vol. IV., Secs. 3487-3488.)

Bills enrolled and signed by the presiding officers of the two Houses of one session have been sent to the President and approved at the next session. (Id. Vol. IV., Sec. 3486.) As early as 1818 the House authorized an investigating committee to continue and report at the next session of the Congress. (1st Session, 15th Congress, Journal p. 447.)

A committee empowered to sit during recess was directed to file its report with the Clerk of the House. (Hind's Precedents, Vol. III., Sec. 1741.)

Committees are empowered to sit during a recess, that is, within the term of the Congress. (Id. Vol. III., Sec. 1741.)

Joint Committees of the two Houses have been authorized to sit during recess of the Congress. (Id. Vol. III., Secs. 1763-1764.)

A message from the President, being presented in the closing hours of a session, it was read at the beginning of the next session of the same Congress. (Id. Vol. V., Sec. 6646.)

A vetoed bill not acted on before adjournment of a session was acted on at the next session of the Congress. (Id. Vol. IV., Sec. 3522.)

Such being the nature of "the Congress," each House thereof is still a House and a body, although it does not sit every moment of the time; when not in active session, each House of "the Congress" has presiding and recording officers (President and Secretary or Speaker and Clerk) who, for all purposes with which the laws may clothe them, represent their respective bodies in an executive and ministerial capacity. Now, though that House in which the bill originated may not be actually sitting in its Chamber at all times during the

two years, yet that House and "the Congress," of which it is a part, is in existence from the time it first meets and organizes until *sine die* adjournment, not of a session, but of the Congress.

2. **The ten days for the consideration and return of the bill may be construed as ten "legislative" days, and under such construction return may be made when the Congress resumes active legislative sittings after adjournment.**

The ten day limitation in the quoted clause of the Constitution, within which the President is required to approve or return bills, is susceptible of two constructions; i.e., ten calendar days after presentation of the bill, including in this case the ninth and tenth days which fall in recess during the adjournment of the active legislative session of "the Congress"; or, ten legislative days—that is, ten days during all of which "the Congress" is in active legislative session, which, in this case, would include the first two days of the second session.

Contemporary judicial construction of the similar words, as used in the Massachusetts constitution, from which the Federal provision was drafted, is found in the Opinion of the Justices, 3 Mass., 567 (1791), holding that this language refers to days of active legislative sittings:

> "If such bill or resolve lays more than five days before the adjournment, and so many days of the court's sitting upon the adjournment, as will make up the full term of five days, without the governor's returning the same, with his reasons for not approving it, we conceive such bill or resolve has the

force of law; for all the days of the court's sitting are but one session, although an adjournment intervenes."

This decision is of further interest and value in this case, for the reason that the Massachusetts constitution of 1780, which furnished the model for the main veto provision of the Federal Constitution, contained no final exception clause, and the effect of any adjournment of the legislative body (General Council) during the period allotted to the Executive for his revisionary consideration of its bills, upon the final legal status of such enactments, had not been declared by the instrument or announced by the courts of the Commonwealth. This decision is a contemporary judicial announcement of practically the same thought as that which the Constitutional Convention incorporated into the final exception clause of the Constitution: "Unless the Congress by their adjournment prevent its return, in which case it shall not be a law," and holds in effect that where there is a subsequent meeting of the same legislative body after the adjournment the Executive must return the legislation within ten legislative days or it becomes a law through his inaction.

When a bill is presented to the President for his consideration, it is the clear intent of the Constitution that it is his duty either to permit the bill to become a law or return it with his objections, in order that the Congress may exercise its right to be advised thereof and have the opportunity to fully consider them. If in its wisdom the bill should become a law, notwithstanding such objections, Congress may then repass it by a two-thirds vote. In this way only can both the Congress and the President be held responsible, as the Constitution

evidently intended, for the performance of their duties in respect to legislation while that Congress still exists.

The following authorities construe the limitation on the executive's time, in which to exercise revision over legislation under state constitutions, to mean, not calendar days, but legislative days, during each one of which the legislature is in active session; and, in case of recess, the governor is given sufficient additional days after the reassembling of the legislature, in which to return bills, to make up the full quota of constitutional days during all of which the legislature is in active session. State v. Joseph (1911) 175 Ala. 579, 57 So. Rep. 942; State v. Norwalk (1904) 77 Conn. 258, 58 Atlantic Rep. 759.

Under such a construction the President could have returned the bill to "the Congress" when it reassembled on December 6, 1926. This was not done, and the bill here under consideration is claimed to be a law through the inaction of the President under either construction of the term "ten days."

3. The final adjournment of the Congress may be a voluntary adjournment prior to March 3 of odd numbered years.

It should be noted that the time of meeting, the times of adjournment, the days and hours of its active legislative sittings are all left to the Congress by the Constitution. The short session, ending on March 4th of the odd numbered years, is merely a temporary accident of the calendar, which all Congresses have had the power to alter by fixing a different and earlier date on which to annually convene. The framers of the Constitution, by fixing the date for the assembling of the

first Congress on the first Monday in December, merely fixed a tentative date for the meeting of subsequent Congresses; and this provision and that requiring Congress to assemble annually were inserted into the instrument without intent or purpose to affect in any manner the previously conceived legislative provisions of that instrument, or the precise powers and functions expressly conferred upon the Congress and the Executive with respect to the enactment of laws.

Under the Constitution, and within the reasonable contemplation of those who framed and adopted that instrument, the Congress, should it so choose, may by enactment convene annually on the first Monday of March instead of December, in each year, and may adjourn *sine die* and finally dissolve at any date the two Houses may fix prior to March 3rd of odd numbered years. Hence, under the Constitution, the final adjournment of the Congress may be a voluntary action on its part, rather than the date of the expiration of the tenure of its members.

4. The distinction between all adjournments of the Congress (other than final adjournment) is one of duration and nomenclature only.

After adjournment for the remainder of the day, or for a day, or for a longer period as for the Christmas recess, or for the summer recess between two sessions of the same Congress, the Congress resumes its business precisely where left off, without any difference occasioned by duration of the recess.

Each separate Congress may also remain in continual legislative session, or have regular monthly, semiannual or annual sessions, with intervening recess, with-

out constitutional restriction or in any way affecting the exercise of its legislative functions or the duty of the Executive to return its legislation, or permit it to become law at the expiration of the allotted ten days, if it is possible for the Executive to divest himself of the control of the bill and place it, with his objections, again within the control of the Congress within the prescribed time.

During temporary adjournment each House has officers who represent it in purely clerical and administrative capacities. From the time of their organization until final adjournment, such officers, in all purely clerical and administrative capacities, represent their respective Houses during suspension of active legislative sittings, whether for the remainder of the day or for the summer recess, and can act for it in the reception, recording, filing and custody of its returned bills and accompanying objections which the President would return within any portion of the ten days falling in recess of active legislative sessions of "that House."

5. **The exception is not unless the Congress adjourn, or unless that House adjourn within the allotted ten days; the exception is "unless the Congress prevent its return by their adjournment."**

"The Congress" is here used in precisely the same sense as the words "the legislature" used in the preliminary draft of the Constitution, as reported by the Committee on Detail on August 6, 1787, and for which it was substituted in the final draft reported on September 12, 1787, by the Committee on Style. The apparent intent of those who framed the Constitution was that the Congress, with

respect to the operation of the veto provisions drafted from the existing models of the Massachusetts and New York constitutions, should be considered in precisely the same character as the state legislatures. The modifying possessive adjective and verb are both in the plural, indicating careful diction, coordinate thought and clear intent that "the Congress" shall, as used, be understood in the plural sense as denoting the concurrent adjournment of the two Houses of the national legislature.

The word "adjournment," in contemporary and in present day meaning as respects sittings of the legislative body, is an indefinite term, meaning either the putting off until another day, or time specified or without day; that is, the closing of some session of a public or official body. The word had not then, and has not now the exclusive meaning that attaches to the word "prorogation" as used to designate the termination of a particular parliament.

The exception is not unless "the Congress" adjourn. The exception is, unless the Congress by their adjournment prevent its return, and it is the character of the adjournment and its effect upon the revisionary purpose of the veto provision, in preventing a return of the bill and a reconsideration thereof with the President's objections, that is meant to constitute the single exception when bills, not returned in ten days fail to become laws.

If all adjournments of the Congress (temporary, interim session, and *sine die*) in contemplation of the framers of the Constitution had the effect of preventing the return of the bill with veto objections, then their economy of language and clearness of diction would have demanded and assured an exception clause predicated entirely on adjournment and reading somewhat as follows: Unless the Congress suspend or adjourn its active legislative sessions within said time, in which case it shall not be a law. Any

such provision would have been in plain derrogation of the express right of the Congress and of the Houses thereof to adjournments during their legislative existence.

In the absense of such language, consideration must be here given to the idea of an adjournment—not all adjournments—but one that will "prevent its return." Effect is to be given, if possible, to each section, clause and word, and no word is to be rejected or discarded which may have a material bearing on the rights and powers granted, and if the language of any part be doubtful, it must be interpreted by every fair intendment to harmonize with the main purpose and not to defeat it. The presumption is that a definite meaning attaches to each word and where the words employed, taken in their ordinary sense and in their grammatical arrangement, embody a definite meaning which involves no conflict with other parts of the Constitution, the meaning thus apparent on its face must be adopted, and it is not within the province of the Court to speculate otherwise as to the purpose of the framers. (Story on the Constitution, Vol. I, Sec. 400.)

The only adjournment that will prevent the return of the bill with the President's objections, within the fair meaning and intent of the veto provision and the quoted exception clause, is such adjournment as wholly defeats the revisionary intent and purpose of the veto clause.

The language of the New York Constitution (1777), which was the model for the exception clause, reads: "Unless the legislature shall, by their adjournment, render a return of the bill within ten days impracticable," and the idea of those who framed and adopted the Federal Constitution was clearly such an adjournment as made any return of the bill for revision impracticable and wholly futile. The Supreme Court of Massachusetts in a decision announced May 9, 1791, practically contemporary with the

adoption of the Constitution, in answering the question as to the effect of adjournments of the General Council of that State on its bills in the hands of the Governor, in 3 Mass. 567, in The Opinion of the Justices, said: "If there is no subsequent meeting of the same general court on the adjournment, we are clearly of the opinion that such bill or resolve has not the force of law," thereby holding in effect that a final adjournment, even without an exception clause prevents an unreturned bill from becoming a law, but also holding other adjournments do not prevent unreturned bills from becoming a law under the constitutional limitation for their return.

6. Adjournment of "that House" is not an adjournment of the Congress, and is not within the exception of the quoted language.

Under the construction ten "calendar" days, Sundays excepted, the exception is yet "unless the Congress by their adjournment prevent its return," and return must be made to "that House," though it alone may be temporarily adjourned for the remainder of the day, or a longer period, the Congress being yet in active legislative session and unadjourned. While return is to be made to a particular House; the adjournment referred to is not the adjournment of a particular House; it is an adjournment of "the Congress"—the whole law making and legislative power of the Country.

The language of the exception clause is plural, and not in the singular or alternative as respects to the two separate Houses comprising "the Congress" which are not mentioned. The prevention of "return" by adjournment is therefore restricted to a prevention of a return occasioned solely by adjournment of "the Con-

gress"—that is a joint and concurrent adjournment of both Houses which comprise the Congress. One House alone is not "the Congress," and a separate recess of but one House alone, taken by that House in which the bill originated, is not within the plain meaning or strict construction of the language of this clause. Consequently, recess or temporary adjournment of "that House" alone, will not operate under the language of this clause to relieve the Executive from the discharge of his revisionary duties as to bills passed by it and theretofore presented to him; or in any way mitigate against the operation of the ten day rule declaring all bills to be laws at the expiration of ten days in the absence of such return.

Hence, though "that House" adjourns for three hours, three days or three months, on the tenth day, and the bill is to be returned to "that House" on that day, such adjournment is not an adjournment of "the Congress."

The Executive must return the bill during the last three hours of the tenth day, although "that House" is not sitting, the Congress being yet in session. If he cannot, it is equivalent to saying that he is bound to return the bill in nine days and twenty-one hours, or in seven days, or any lessor period to which the time to make return is limited by a recess taken by "that House," and if he fail to make a return the bill becomes a law within ten days despite his objections, though, perhaps, it was only passed by one majority.

An adjournment by "that House" for the remainder of the tenth day (taken before the President has completed his veto message and can return the bill to that House in session), not coming within the language of the exception clause and "the Congress" being still in

existence, then the bill must be constructively returned to that House, during its temporary recess, by delivery to the presiding or recording officers thereof during the remainder of the tenth day, else the bill becomes a law. The next day, the eleventh, is too late.

If the President within ten days may communicate with "that House" while its active legislative operations are in a state of suspense from one day to another, or from one day to two or three, or from three days to three months (were such a case possible), by returning and depositing the papers that the Constitution gives him the right to return within the ten days, with the responsible officers of "that House," whom it has chosen, all that is required of such officers is that they receive and care for the same in like manner as the other records of "that House," to be taken up with its other unfinished business when that House again resumes its active legislative sittings.

Clearly the adjournment that will prevent a return is limited by the language of the Constitution to an adjournment of the Congress, not of "that House" thereof.

7. The President's power and duty with respect to the return; the bill must be returned, if return can be made.

The declared purpose, and the clear intent and policy of the framers of the Constitution was to place the legislative power of the government solely in the hands of the Congress. The Executive, under the veto provisions, was simply made an instrumentality for the revision of hasty or ill-considered enactments. If he approved, he signed, and the bill forthwith became a law; if he failed to act, the bill became a law after lying in

his possession ten days. If he had objections, or suggested revision, by the return of the bill in ten days the same remained in the nature of unfinished business of the Congress until reconsidered and was either passed over the objections by the vote of two-thirds of each House, or failed to pass. The only exception is where the President would return the legislation and "the Congress, by their adjournment, prevent its return, in which case it shall not be a law."

There are no constitutional requirements either that this revisionary or veto power be exercised only during the hours and days of the active legislative sittings of the Congress, or that the bill be returned to "that House" only during the active legislative session of the Congress, or that the returned bill and veto must be received and acted upon during the same session of the Congress at which the bill was passed. The Constitution having imposed no such restrictions on the exercise of these constitutional powers, neither the President nor the Courts have power to impose such restrictions on the free exercise of these constitutional rights and powers by either the Executive or Congress. The sole exception is where "the Congress, by their adjournment, prevent its return." It was never the intention that the President's inaction should in any way defeat such legislation. It was to guard against that very abuse that the ten day clause was inserted, and the single exception is limited to an act of the Congress itself defeating the revisionary purpose of the whole veto clause and any return of the bill and objections by a final adjournment of the Congress within the allotted ten days. The effect is to leave the bill not a law, but as unfinished business which dies with the final adjournment of the Congress.

The constitutional right of the Congress, vested with sole legislative power to have its enactments become laws, is not to be lightly considered or unnecessarily denied. The President's duty to act is not affected by his illness, his incapacity, his absence, or press of executive duties, or consideration of more important legislation; nor by the intervention and urgency of mighty affairs of state; nor even by the exigencies of internecine war, or any other causes that may involve the very existence of the government. He must act and make return of the bill and objections in ten days, unless the Congress "by their adjournment prevent its return."

No act or situation of the President can prevent the bill becoming a law, if unreturned in ten days; no other obstacles imposed by the Congress, and no other act of the Congress or of "that House" in refusing to accept or in impeding such return can prevent the bill becoming a law in ten days if unreturned by the President; again the sole exception is where the Congress "by their adjournment" prevent such return.

In the light of this policy and this purpose, it appears to be the constitutional duty of the President to afford the Congress an opportunity to again receive and control its legislation before the end of ten days; to permit Congress to consider his objections to any bill passed by it; and to re-pass or reject the bill in final legislation thereon, if reasonably possible for him to do so before the final adjournment of the Congress so passing the bill.

8. The object and purpose of the return of the bill wholly defeated by "Pocket Veto."

It was the intention of those who framed and adopted the Constitution that all Presidential vetoes should include

the reasons for the refusal to sign, and if the President fails to approve a bill he is required, by the pain language of the instrument, "to return it with his objections." The sole object and purpose of this return of the bill is to again place the legislation before the Congress for reconsideration, with the objections, in fulfillment of the revisionary intent and purpose of the veto clause. This object and purpose may reasonably be accomplished so long as the Congress continue to exist as a legislative body capable of reconsidering the bill and of passing upon the President's objections. Such action by Congress may be taken at any time before final adjournment.

Any construction of the quoted exception clause that permits the Executive to withhold the legislation of an existing and continuing Congress beyond the specified ten days limit and to finally dispose of such legislation by the simple expedient of placing it in an Executive pigeon hole, and subjecting it to a so-called "pocket veto," in no way serves the purpose nor carries out the revisionary intent of the whole veto clause. Such construction not only prevents all revision, but confers on the Executive an absolute veto power. It would also appear to be a serious and unwarranted infringement on other rights of the Congress and to deprive the Congress of their exclusive right to legislate as to the particular bill, and be advised of the President's objections thereto.

9. Duty and ability to return bill to "that House" not changed by a concurrent recess of the Congress.

Granting that the exception clause applies only to a prevention of return caused by adjournment of the Congress, and that return must be made to "that House," it

alone having temporarily adjourned during the ten days allotted the President for consideration of its bills; then there is no conceivable way in which the President's duty or ability to make such return to "that House" in recess is in any way altered or affected by the concurrent temporary recess of the other House constituting the Congress, where the adjournments are temporary and both Houses of the Congress later reassemble and sit after the adjournment and resume their interrupted legislative programs.

If return may be made to "that House" during its temporary recess, then the same return may be made and the whole object and purpose of "the return" may still be accomplished though "the Congress" be in adjournment for a day, or over a holiday, or over the Christmas Holidays, or for the summer recess. Temporary recess and suspension of active legislative sittings of the Congress, before the expiration of the ten days, can thus neither prevent a return nor defeat the intent and purpose of the veto provision, where return may be made in ten days to "that House" in its temporary recess. The bill and objections may be considered and acted upon by "the Congress" when again sitting after the adjournment, and before the final adjournment that dissolves the particular Congress that passed the bill. Within the spirit and intent of the instrument, inability to make return, on account of adjournment of the Congress, should be co-existent with inability of the Congress thereafter to consider the objections. The revisionary purpose of the general veto provision may be fully accomplished, despite the fact that the Congress is in temporary recess at the time of the required return.

10. **The return of the bill is simply the act of the President in divesting himself of further custody and control of the bill and replacing it, with**

his objections, in the actual or constructive control of the Congress.

The presentation of bills to the President and his return of the same for revision are simply a process in legislative procedure like the handling of bills in committee, or in conference, or by the separate Houses. It is not necessary that each House be actually sitting in active legislative session during every hour or day that the other House sits, or while its committees function, or while the Executive considers its legislation. The presentation of bills to the President, his consideration thereof and his return thereof, may reasonably be accomplished during hours and days when the Houses of the Congress are not actually sitting in their respective Houses in active legislative session without violation of the spirit or language of the Constitution. In event that the Congress has adjourned either for the remainder of the day, or for the summer recess, then by a reasonable construction the President may, on the tenth day allotted to him, make return of the bill to "that House" of the Congress which will again resume its active legislative sittings the following day, or the following December, according to the length of the adjournment, by the delivery of the bill and veto message to the recognized officers of that House, who, for all legal intents and purposes, represent and act for that House in a purely clerical and ministerial capacity during the hours and days when "that House" or the Congress is not in active legislative session.

A concession that the exception clause does not apply to adjournment of "that House" alone, the Congress being yet in session, and that, in such case, return must yet be made to "that House" in its temporary recess for the remainder of the day, or for several days, as the case may be, is a concession that a like return may be made to "that House"

wherein the bill originated, during the concurrent adjournment of the other House or of the Congress; and is a concession that the only adjournment which can prevent the President's return of the bill is the final adjournment of the Congress.

The Constitution seldom goes into details as to the precise manner in which a constitutional duty shall be performed, leaving it to reasonable discretion and judgment how the precise act shall be performed, and under practical construction all that would seem to be required of the President is that during temporary recess of "that House" he make the best return that the circumstances permit within the ten days, and that this requirement for the return may be fully satisfied by return and delivery of the bill and objections to a responsible officer of "that House," vested and clothed with the care and custody of its records and bills. Such return again accords the Congress, vested with sole legislative power, full potential power and control over the legislation that the President does not approve of and does not desire to become a law under the ten day clause. U. S. v. Allen, 36 Fed., Rep. pp. 174-6, is authority that a return to and receipt by a journal clerk of the House is a sufficient return. In actual practice bills are often presented to the President by delivery to his secretary or executive clerk, who receipts for the same on behalf of the President. No one has ever questioned the validity of such presentation. In this case a return of the bill, and any objections, by delivery of the same on July 5, 1926, to the President, the Secretary, or the journal clerk of the Senate would have been all that was reasonably required under the Constitution, and no one could have properly questioned the legality or effectiveness of such return as a full compliance with the requirement in like manner as if the return had been made at the precise hour when that House had adjourned its sittings for the day.

II. THE AUTHORITIES

There are no decisions of a Federal Court on the precise question now before this Court except that here on review. The courts of last resort of several states, where the same question of construction has been raised as to similar or identical language in State constitutions, have been unanimous in holding that the adjournment contemplated in the quoted clause of the Constitution is a final adjournment. These authorities were presented to the lower court (Opinion R. p. 6, Line 38), referred to as "supposed to bear upon or decide similar questions," but not otherwise considered. It is petitioner's contention that these authorities pass upon and decide the identical question now before the Court, and that they are, in the absence of Federal decisions, peculiarly pertinent and applicable as aids in the construction of the quoted clause of the Federal Constitution because its veto provisons were drawn from and modeled on the then existing constitutions of Massachusetts and New York. The Opinion of the Justices, 3 Mass. 567, referred to above, was a decision practically contemporary with the adoption of the Constitution. These authorities in order of their announcement are as follows:

1791 Opinion of Justices, 3 Mass. 567.
1864 Soldiers Voting Bill, 45 N. H. 607.
1870 Harpending v. Height, 39 Calif. 189.
1875 Corwin v. Comptroller, 6 So. Car. 390.
1881 Miller v. Murford, 11 Nebr. 377.
1882 Wolfe v. McCaull, 76 Va. 876.
1886 Heyquembourgh v. Dunkirk, 49 Hun. (N. Y.) 550.
1912 State v. Joseph, 175 Ala. 579.
1913 Tuttle v. Boston, 215 Mass. 57.
1916 Johnson City v. Electric Co., 133 Tenn. 637.

III. THE OPINION AND DECISION OF THE LOWER COURT DISCUSSED

The construction urged by defendant and adopted by the lower court is to the effect that the quoted language of the exception clause means unless the Congress adjourn, and that any adjournment of the Congress existing at the expiration of the allotted ten days *ipso facto* prevents an unreturned bill from becoming a law.

This construction is based, and necessarily based, on the assumption that there is an implication in the Constitution that the President can only return a bill to "that House" while the Congress is in active legislative session; and that if the Congress be not in active legislative session, but in temporary adjournment, on the last day or even the last hour of the full ten days allotted to the President for the consideration and return of bills, such bills fail to become laws by reason of the mere existence of such adjournment.

The Court (Opinion R. p. 65, line 15) says that "the Constitution does not limit the time of adjournment to the final adjournment of the second session and the courts have no right to so limit it." Our answer is that the Constitution has not made the exception, when bills unreturned in ten days fail to become laws, simply an adjournment of the Congress occurring or existing at the expiration of the allotted ten days; the exception in plain language is: "Unless the Congress by their adjournment prevent its return." Had those who framed the Constitution intended the construction announced by the lower court they would have said so in plain words; what they have said is that the sole occasion when bills presented to the President fail to become laws in ten days is where such return is prevented, and

the sole excepted cause of prevention is prevention occasioned by the adjournment of the Congress.

The opinion and decision of the court wholly fails to consider the object and purpose of the return, or the possible effect of any existing adjournment of the Congress to interfere with or prevent the President's attempt to divest himself of further control over the bill, and to restore it to the actual or potential possession of the House wherein it originated; or to affect or defeat the revisionary purpose of such return. The court in effect held that the constitutional right of the Congress either to have its legislation returned to it, or to have it become a law through the President's inaction, is forfeited by the mere exercise of such right to recess during all or a part of the ten days allotted the President to consider its bills; that the exercise of right to recess is also in conflict with and its enjoyment further conditioned on a forfeiture of the right to receive and know the President's specific objections to its legislation, and its right to enact such legislation into law by two-thirds vote, notwithstanding any objections the President may have and return therewith.

Such construction gives to the President's silence and inaction the very abuse that the ten-day clause was inserted to correct—greater power than to his expressed objections, returned to the Congress with the bill. This construction not only wholly defeats the purpose of the particular clause to which it refers, but in effect gives to the President an absolute veto power which was clearly denied him by the Constitution. Absolute veto power, based upon the return of a bill, is wholly unknown under any constitution, State or Federal, under which we live, and such a veto can under no circumstances be upheld without doing violence to both the

letter and the spirit of the Constitution. No absolute veto should be upheld, based upon failure to return a bill during the legislative existence of the Congress.

The lower court apparently gave scant, if any, consideration to the policy, purpose and intent of the whole veto clause, or even to the exact wording and precise meaning of the quoted clause under consideration by it, the major idea embodied in which is a prevention of return. Even this exception of prevented return is limited to a single cause—prevention by adjournment of the Congress. The sole purpose of the veto is suggested revision; the sole power to pass on suggestions for revision or to revise the legislation is in the Congress; the sole purpose of the return is to restore the legislation to the Congress for reconsideration; and the only way in which intended legislative action on the return, contemplated under the Constitution, can be prevented is by the final adjournment of the Congress. The lower court gave no consideration to the effect and obvious results following its construction, which are so in conflict with reasonable interpretation of the policy and purpose of the instrument and the mischief this clause was designed to prevent as to require the rejection of the construction for one more in harmony with its language and purpose. The construction presented and insisted on by petitioners is a reasonable and harmonious one.

1. Limited revisionary purpose of the veto clause in the Constitution.

The sole legitimate function of the Executive under the Federal Constitution, as respects legislation passed by the Congress, is to act as an instrument to suggest

revision. The power of legislation is placed solely in the Congress of the United States. The Executive can approve and the legislation becomes a law; but he may not approve, and the legislation becomes a law in ten days notwithstanding his inaction. When the President thinks Congress has not acted wisely, he may state his specific objections and return the legislation to Congress within ten days, but even in this case it is left wholly to the Congress itself (expressly vested with all legislative powers by the Constitution) to determine finally what shall be done with such legislation. The only power conferred on the Executive by the Constitution is that of requiring, by his suggested revision and the return of the bill in ten days, that the Congress which passed it reconsider the particular legislation; and, if they choose to repass it, the Constitution, not the President, requires a two-thirds vote to thus repass it over the Executive's revisionary objections.

The construction adopted by the lower court thus gives no consideration to the purpose, intent and policy of the makers of the Constitution that the will of the Congress should be supreme, and to the limited revisionary purpose of the veto power granted. Such construction deprives the Congress unnecessarily of its exclusive right to legislate; prevents any revision, and clothes the President with an absolute veto, contrary to the will of those who framed and adopted the instrument. The constructions urged by petitioners give reasonable force and effect to their purpose, intent and policy in drafting these clauses. (The Federalist, No. 73; Madison Papers, Langtree and O'Sullivan Edition, 1840, pp. 733, 739, 783-91, 809, 812, 860, 891, 1130, 1161, 1169, 1171, 1189, 1224, 1226, 1231-2, 1248, 1332, 1541, 1543, 1548, 1565, 1570.)

2. Executive precedents involving exercise of and asserted right of pocket veto power contrary to the policy, spirit and intent of the Constitution and in direct derrogation and defeat of other rights and powers conferred thereby, and opposed to the plain language and reasonable meaning of the instrument, are not a first or best guide nor compelling authority for the construction of the language here under consideration.

Under the Constitution it is a primary function of Congress to make the laws, the Judiciary to interpret them and the Executive to administer them. It is for the courts alone to construe the Constitution. In such construction the plain language of the Constitution is the best guide. The language should be construed in accord with the spirit of the time of its adoption and the prevailing sentiment of the people. Precedents (Congressional or Executive) are not a first or best guide for construction, and should be resorted to only as a last resource, all other means of interpretation having failed. There are strong Congressional precedents in favor of petitioner's insistence and if Executive precedents are to be given serious consideration, then equal consideration should be given to contrary precedents of construction by Congress, but neither construction, nor precedents of construction by the Executive or by Congress, override the clear meaning and plain intent of the Constitutional language.

Precedents cannot abrogate the provisions of the Constitution. Contemporary or subsequent construction can never abrogate the text of a constitution; it can never fritter away its obvious sense; it can never narrow down its

true limitations; it can never enlarge its true boundaries. (U. P. R. R. Co. v. U. S. 10 Ct. Cl. Report 548, s. c. in 91 U. S. 72; Story on the Constitution Sec. 407.) Acquiescence or sufferance for any length of time can not legalize a clear usurpation of power, where the people have plainly expressed their will and appointed judicial tribunals to interpret and enforce it. (See Cooley's Constitutional Law, 6th ed. (1890) p. 85.) A claim of power is frequently permitted or yielded to merely because it is claimed, and it may be exercised for a long period of time in absence of any constitutional right or power, and even in violation of constitutional prohibition without special occasion arising for its interpretation by a court, or any one being sufficiently interested in the subject to raise the question, but these circumstances can not be allowed to sanction a clear infraction of the Constitution or the neglect to discharge constitutional duties or the disregard of the clear right of the Congress. (Cooley's Constitutional Law. Id. pp. 85, 86; Pingree v. Auditor, 120 Mich. 95; State v. Weightson, 56 N. J. L. 128; State v. Veacon, 66 Ohio St. 491; Harrison v. Willis, 7 Heisch. (Penn.) 35; McPherson v. Secretary, 92 Mich. 377; Henry v. Cherry, 30 R. I. 13.)

Neither the President nor Congress can by action or precedence, or concurrence therein, alter the plain language or defeat this clear intent and purpose of the Constitution.

Therefore, neither the assertion, or use by the Executive of the "pocket veto," is in any way controlling upon the interpretation of the constitutional provision herein questioned. Had Congress remained entirely silent regarding the matter, such silence can not amount to a controlling acquiescence to defeat the purpose of the constitutional provisions, when the judicial branch of the government alone

has been vested with the power to determine whether or not, under the provisions of the Constitution, a bill so ignored or pocket vetoed has become a law. And this is the precise reason for the case at bar. The effect of Executive action in this regard is entirely comparable to the effect of the action of Executive Officers in making regulations construing acts of Congress. The Supreme Court has frequently held that the Departmental regulations must be kept strictly within the Statute which is the source of their authority and that no Executive Officer can by regulation either enlarge, limit or modify the rights and privileges conferred or duties imposed by the statute to which such regulations relate. (Waite v. Macey 246 U. S. 606; U. S. v. United Verde Copper Co. 196 U. S. 207; Morrill v. Jones 106 U. S. 466; U. S. v. Merriam 263 U. S. 187-8). The same principle is equally applicable to Executive and Congressional action in reference to the construction of the Constitution. Such construction of the Constitution by either the Executive or Congress is material only when clearly within the intent and meaning of that instrument. Therefore, whether the Executive has asserted the right of pocket veto or Congress has or has not so acquiesced in the use of the pocket veto in the past, is entirely immaterial, for the policy, the purpose, the plain language and clear intent of the Constitution is controlling. This requires the Executive to return within ten days all bills objectionable to him, if in any way possible, to the House in which they originated. Under the Constitution, Congress alone has exclusive power to legislate and to determine whether or not a bill shall be a law, notwithstanding any objections of the President thereto. This right, and the capacity of Congress to exercise it, continues as long as the particular Congress exists, and it is terminated only by the dissolution of that Congress by its final adjournment. The legitimate power of the Execu-

tive to obstruct legislation is limited to the return to Congress of such bills as he objects to, with his reasons therefor. The Constitution clearly requires the return of all bills objected to by him with his objections, unless such return is prevented by the adjournment of the Congress. It is, therefore, the character and effect, not the duration of the adjournment, which prevents the return of the bill. Return by the Executive can be prevented only in case the Congress passing such a bill has ceased to exist. During the existence of Congress, there is no time subsequent to its organization when the Executive can not return a bill with his objections, either directly to the House where it originated, in ten legislative days, or to the duly authorized officers and agents thereof in ten calendar days, including a tenth day falling in recess, to be presented by such officers to that House for its consideration at the proper time therefor.

3. Origin and development of the so-called power and practice of "pocket veto."

Executive precedents of asserted inability to exercise revisionary power over or to return legislation presented within ten days of the temporary recess of a Congress, arose from a misconception and misunderstanding of the nature of a Congress, and of the character of its sittings, and of the effect of its temporary adjournments. They were originally based on the following mistaken conceptions:

1. That the exception, when unreturned bills do not become laws, was when Congress was in temporary or other adjournment at the expiration of the allotted ten days.

2. That the Executive's function in revision of bills could only be exercised during hours and days when the Congress was in active legislative session.
3. That the adjournment of a first or intermediate session of the same Congress was analogous, in effect, to the prorogation terminating a particular Parliament.
4. That the several sessions of a Congress were separate and distinct legislative entities, each terminating all legislative work of the Congress.

Some of these mistaken ideas prevailed until very recent times. On March 12, 1863, when President Lincoln, after final adjournment of the 37th Congress, signed the "Abandoned Property Act," previously passed by that Congress, the first important step was taken in a reasonable interpretation and construction. Many people, however, continued to question the Executive's power to act during a recess, or to approve after final adjournment. The law was not settled until the decision in Weil v. U. S., 29 Ct. Cl. 523, had been confirmed by this Court in La Abra Mining Co. v. U. S. 175 U. S. 446, and President Wilson had signed the Water Power Bill in 1920 on advice of Attorney General Palmer (Op. Atty. Gen. Vol. 32, p. 223.)

There is no limitation, by language or implication in the Constitution that prevents the President from exercising revision over legislative acts and from returning bills with his objections to "that House" during hours and days when the existing Congress is not actually sitting in its House in active legislative session.

The present asserted right of silent pocket veto is a gradual development of asserted and unconstitutional Executive power. Most of the early so-called "pocket vetoes" embodied an actual return of the Bill with veto objections returned to the Congress when again sitting after the adjournment. Witness the Message of Madison, Nov. 5, 1812,

and that of Jackson, Dec. 6, 1830, accompanying the return of the vetoed bills. These first so-called pocket vetoes actually restored the bills to the Congress when again in session, with regular veto objections, in harmony with the general intent and purpose of the veto clause, and in accord with the construction that the ten days means ten legislative days. Madison expressed the opinion that the bill "having been presented too near the end of the session * * * failed to become a law." President Jackson returned another bill with specific veto objections with his message of Dec. 6, 1832. During those years the Executive still accorded to Congress its unquestionable right to receive back its legislation; to know the specific objections thereto, and to repass the legislation, if it desired, by two-thirds vote, notwithstanding the veto objections.

Though President Madison overlooked a minor bill in 1816, there was no practice of silent veto of bills, or return of legislation without specific objections, until December 14, 1842, when President Tyler returned to the 27th Congress in 3rd Session, H. R. 210 and H. R. 604, passed by that Congress in second session, without specific ground of objection to that legislation. This "silent" veto was not a "pocket" veto, for the President still recognized a constitutional duty to return the bill to the Congress, and his action still afforded the Congress the right to reconsider and to repass that legislation within its constitutional right before final adjournment. Therefrom arose the first use of the word "pocket" with reference to the withholding of bills. See Burrow's remarks, January 24, 1848, Congressional Globe, p. 225, *idem*, p. 203.

Silent pocket vetoes, or the practice by some Presidents of deliberately withholding bills presented within ten days of the adjournment of an intermediate sitting

or first session of a Congress, without return or objections, really began under President Johnson's administration. On April 20, 1867, Johnson filed a joint resolution with the Secretary of State without his approval and with a statement of his reasons. See Messages and Papers of the Presidents, Vol. VI, pp. 535, 536. This was the first positive assertion of a silent pocket veto power or of refusal of a President to return to Congress legislation submitted to him which he did not approve of or desire to become a law, and is the first precedent of positive Executive action expressly denying to the Congress the right to receive back its legislation and to enact it into a law notwithstanding the Executive's objections thereto. The withholding of this bill drew forth a strong opposition to such action and construction from the Congress. Congressman Elliott, in Congressional Globe, 1st Session, 40th Congress, p. 512, Col. 3, said: "The bill had already become a law by reason of not having been sent back during ten days." Senator Edmonds, Congressional Globe, 2d Session, 40th Congress, p. 720, after citing the decision of the New Hampshire Supreme Court in the Soldiers Voting Bill, 45 N. H. 607, and asserting a like construction for the quoted language in the Federal Constitution, said: "This construction of the Constitution now held by the Executive is altogether erroneous and would, in practice lead to very serious consequences." (See also Senate Debate and action on S. 366, 40th Congress, 2nd Session, Cong. Globe, pp. 1204, 1371, 1404, 1834, 1840, 2076 and Hind's Precedents, Section 3494.) Notwithstanding Senator Edmund's alleged change of opinion later, as claimed by Attorney General Miller, in 20th Op. Att'y. Gen. at page 503, 6, the Attorney General concludes his opinion as follows:

"Upon the whole I advise that bills coming to you during the recess of Congress, or within ten days prior thereto, be signed or vetoed as they meet your approval or disapproval, the bill, in case of veto, being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court."

From the very first assertion, therefore, of this full claim of Executive right to kill legislation by silent pocket veto during existence of the Congress that passed it, there has been a denial of that right by Congress and the Judiciary Committees of the Houses, and the action of the House Committee on Judiciary of the 69th Congress, 2nd Session, with respect to H. Res. 739, and of the House itself in Committee of the Whole House in consideration of the Deficiency Appropriation Bill, shows a present existing conflict between the Executive and the Legislative Branches of this government with respect to the construction of this clause in the Constitution. (Rep. No. 2054, 69th Congress, 2d Session; Congressional Record, p. 4933.) In deciding this question the Judicial Branch of the government, as represented by this court, has sole power of construction and of final decision under the Constitution.

These Executive precedents, even if acquiesced in by a particular Congress, cannot defeat or change the policy, purpose, intent and the plain language of the Constitution, or deprive the people and their succeeding Congresses of the powers conferred by the Constitution, or enlarge the true limitations placed upon the Executive thereby.

Executive precedents of pocket veto are not unanimous.

Of the twenty-nine Presidents, an examination of their legislative records show that ten: Washington, John Adams,

Jefferson, Monroe, John Quincy Adams, Polk, Taylor, Fillmore, Pierce, and Garfield never recognized, claimed or asserted a right of "pocket veto." Others as Van Buren, Tyler, Polk, and Buchanan confined their pocket vetoing of bills strictly within the clear intent and purpose of the Constitution, and to bills presented to them within ten days of the final adjournment and dissolution of the Congress. Several other Presidents, while taking the mistaken view that the existence of a temporary recess adjournment of the Congress, prevented its bills from becoming laws under the ten-day clause, yet recognized the clear right of the Congress to receive back its bills and returned them with specific objections when the Houses again resumed active legislative sessions. There is no means of ever ascertaining by what majority the Presidents would have repudiated the present asserted right of the Executive to withhold and kill the legislation of an existing and continuing Congress.

The present asserted right of pocket veto is applicable to every adjournment of the Congress.

The present practice of silent pocket veto, and withholding of bills without return or objections has been clearly developed since President Johnson's time. As now asserted it applies equally when the Congress chance to be in adjournment for the remainder of the day, or for a day, or for the Christmas recess, and to the adjournment of first or intermediate sessions of the Congress. And if this asserted power may be exercised when Congress adjourns for Christmas recess, it may likewise be exercised when Congress adjourns for the remainder of the tenth day, or for the summer recess, for confessedly

the Congress has no power to curtail in any way the full ten days allotted to the President for his consideration and return of bills of the Congress.

On December 30, 1892, President Harrison signed a memorandum that he had, in effect, pocket vetoed, S. 2275, presented to him on December 15, 1892, because the Congress adjourned for customary recess from December 22, 1892, to January 4, 1893. There is no distinction between this adjournment and an adjournment for "the remainder of the day" or for the summer recess, except in duration. Under this asserted extraordinary Executive power, by implication and unreasonable construction, the policy, intent, purpose and the plain language of the Constitution have been defeated, and the Congress wholly deprived of a constitutional right to necessary and desired recess adjournments save and except that conditioned on the surrender of its exclusive right to legislate, and the loss of its right to receive back its legislation, and to repass it by two-thirds vote notwithstanding any objections of the President.

The true construction is not whether Congress has recessed or adjourned, but whether the Congress by their final or other adjournment have prevented a return of the bill with objections; and inability to return, should be construed to be equivalent to and co-existent with inability of the Congress to thereafter legislatively consider the bill and objections.

4. Obvious results from adhering to construction adopted by the court below.

The rule of construction is that the intent of the lawmakers shall be ascertained, that a harmonious whole shall

be sought if possible and that construction shall be avoided which will lead or may lead to absurd or illogical consequences. As said in New Lamp Chimney Co. v. Ansonia Brass Co., 90 U. S. 656-63:

> "Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualifications, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation—as by qualifying both, or by restricting one and giving to the other a liberal construction—all become harmonious and the whole difficulty disappears."

A consideration of obviously possible results of holding that a pocket veto may occur whenever the Congress is in temporary adjournment during all or some of the ten days allowed the President for acting on legislation will demonstrate the necessity for a true rule and that the only true rule is one dependent on final adjournment of the Congress.

Assume that the Congress and the Executive are of opposite parties, or are of strongly divergent views. A tariff bill or a declaration of war is passed by the Congress and presented to the Executive, who proceeds to write a veto message, which by force of its importance or of circumstances, is not completed until two o'clock P. M., on the tenth day. On that day the body in which the bill originated and the Congress, by reason of death of the Speaker or a popular member, or other reason, adjourns immediately after assembling at noon. If the President cannot, because the Congress has adjourned, return his veto message to the Congress by forwarding same and making the return to an officer of the proper house to be laid before it upon resuming its sessions, then the Congress is deprived of its power and duty if two-thirds favor overriding the veto, and we

must have the anomaly of a new tariff bill or a new declaration of war repassed by the same Congress, without formal knowledge of the Executive's objections to their previous legislation, and a "pocket veto" greater in power than a veto message.

If, on the other hand, the President's message arrives at that House in which the bill originated and, finding the House adjourned, it is returned to the Executive Mansion undelivered, whereas the return, under the Constitution, could have been made to an officer of the legislative body chosen pursuant to the authority of the Constitution, then we have the condition that the bill has become a law without Executive disapproval, despite the intention of the Executive to disapprove—for the next day, when Congress may-hap will be in session, would be too late. As said by the Court in Harpending v. Haight, 59 Calif. 189, return should be made "in the most direct manner that circumstances would permit."

A holding that the return may be made in ten legislative days when the Congress is again in legislative session after the adjournment, or in ten calendar days, to the Congress though not in active session, in case the Congress has not finally adjourned, is the only construction that preserves true balance, rights, powers, and duties of all concerned. The fact that such construction may work inconvenience to a particular class of officers and persons (the Executive's messenger) furnishes no grounds for the Courts to ignore the evident intent of the provision. Chance v. Marion County, 64 Ill. 66.

As stated, a construction that the return can be made when the Congress is not in active session and can be made to an officer of the House of Representatives or the Senate, is a construction that adjournment for the session until the following December does not "prevent the return" being

made under the Constitution and leaves the main intent and purpose of the veto provision of the Constitution unimpaired. If an adjournment of one or two days does not prevent a return, neither does one of three months.

If the rules of Congress were in antagonism to the Constitution the rules would have to be changed; but, the rules are not in antagonism. The receipt of a message from the President is not the transaction of business. Congress may receive a message from the Executive even when not organized. It is action on the return which can be had by the Congress alone. The reception of a message from the President is not the transaction of business (Hind's Precedents, Vol. 5, Secs. 6600, 6647). The messages are received and retained and then submitted to the House or the Senate, as may be, whereupon the legislative functions proceed.

Within the meaning and intent of the Constitution the construction adopted by the lower court, legalizing the application of a "pocket veto" to the legislation of an existing and continuing Congress during the temporary recess of its legislative sittings, seems to be clearly in violation of the Constitution in the following respects:

(1) It is an unwarranted interference with the exclusive legislative power of Congress.

(2) It prevents consideration by Congress of the reasons on account of which the legislation is objectionable to the Executive.

(3) It prevents such corrective modification of the legislation as may commend itself to the mind of Congress.

(4) It constitutes an absolute prohibition against such legislation by the Executive, who is denied that power by the Constitution.

(5) It deprives Congress of its constitutional right to pass such a bill over the President's objections by two-thirds vote of both Houses.

(6) It is antagonistic to and defeats the revisionary intent and purpose of the veto clause.

(7) It defeats the very intent and purpose of the ten-day clause to which it is attached, the purpose of which was to prevent any defeat of legislation by the non-action of the President, and, by the construction adopted, the precise abuse sought to be guarded against is permitted.

(8) It is in derrogation of the reasonable exercise of the right of the Congress and of the Houses thereof to recess adjournments without jeopardizing or defeating their legislative acts.

(9) It ignores the plain meaning of the words; i. e., a prevention of return caused by adjournment.

(10) It unnecessarily defeats the clear intent that unreturned bills should become laws at the expiration of ten days, if it is reasonably possible for the President to return them to Congress.

(11) It thus unnecessarily and unreasonably obstructs and delays legislation.

(12) If legislation is to be enacted on the subject, it requires the Congress to again re-enact the identical bill, without formal knowledge of the reasons why the President withheld his approval from the prior enactment; and though two-thirds of each House re-enact it, the second bill may be likewise "pocket vetoed" should the Congress for any reason recess on the tenth day.

IV. Errors of Court Below.

As many of the points raised in the several assignments of error are closely related and have been suggested in the

foregoing statement and argument, for convenience and brevity they have been grouped in the following discussion thereon:

1. **The court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of the Constitution, in the light of contemporary history .**
4. **The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.**

The Primary Rule for Construction.

Judge Story, in Prigg v. Pennsylvania, 16 Pet. 539, 610, says:

> "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operations and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

See also: Justice Cooley in People v. Harding, 53 Mich., 481, 485, and Ex parte Wells, 18 Howard 307.

The Spirit and the History of the Times is opposed to any extension of veto power.

For even the most casual reference to the history of the times it is clear that there was then a determined intention on the part of the people to withhold

from the National Executive all power to defeat their legislative will as expressed by enactments of their Congress. The Articles of Confederation withheld all veto power. All contemporary State constitutions, except the Massachusetts constitution of 1780, denied to the governors even a qualified revisionary veto. The proposal to give the National Executive an absolute veto under the Federal Constitution was, after spirited debate, unanimously voted down. When the Constitution was drafted the great fear yet existing in men's minds was Executive usurpation and defeat of the popular will as expressed in legislative enactments. The use to which the King and the Royal Colonial governors had put their power was yet fresh in the memory of the people and of the delegates, most of whom had participated in the Declaration of Independence and in the War. The veto power was yet regarded with a very great distrust and disfavor and the people were extremely solicitious and jealous of that power, and any grant of it was at all times hedged about by carefully expressed limitations, and the right of its exercise by the Executive must always be supported by plain and undoubted authority. (People v. Buffalo (1898) 20 N. Y. Sup. 51, 53.) The Constitution gives the President no power to defeat legislation; merely a power to suggest revision and thereby require reconsideration of the bill by the Congress. If no revision is suggested or attempted, then the bill becomes a law, notwithstanding the President's failure to approve the bill, except such bills as may fall within the perview of the exception clause now under consideration.

2. **The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.**

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with the words and sense and would enforce and protect such purpose.

The specific purpose of the exception clause and of the ten-day clause to which it is attached.

The very obvious purpose of the exception clause, here under consideration, was to fix and declare the precise status of a Congressional enactment in event that the Congress which passed it should finally adjourn as an existing legislative body within the prescribed ten days and thereby defeat the revisionary purpose of the general veto clause, and curtail the full ten days allotted to the Executive for consideration and return of the bill with his objections. In other words, the ten-day clause was directed against a possible Executive abuse defeating legislation and nullifying the revisionary purpose of the veto provision; and the exception clause was directed against possible Congressional action that would likewise defeat the revisionary purpose.

It was never intended, under these provisions of the Constitution, that the Executive should, by withholding a bill, defeat legislation. The sole purpose of the ten days' clause was to prevent a delay or defeat of legislation by the failure or refusal of the Executive to sign and approve, or to return with specific objections legislation passed by the Congress and submitted to him for revision. If the President fails to act in approval or disapproval, the bill becomes a law; if the Congress, by final adjournment as an existing legislative body, leaves some of its legislation incomplete, in that the ten days allowed the Executive for its return has not elapsed, then such legislation dies with the expiring Congress, along with its other unfinished

legislative work, then in committees, in conference, or undisposed of on the calendars of its respective Houses. Even in this event it should be noted that it is the act of Congress in final adjournment, not the act of the Executive, in withholding bills, that determines their final fate as incomplete legislation of the Congress.

The construction adopted by the court below thus permits the very abuse sought to be guarded against by the ten days clause, while the construction urged by petitioners gives reasonable force and effect to the true purpose of the language.

5. **The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.**
6. **The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.**

In the construction of a Constitution what is implied is as much a part of the instrument as what is expressed. (Re Yarbrough, 110 U. S. 651.) There arises from the veto provision of the Constitution, coupled with the legislative provisions whereby sole power to legislate is vested in the Congress, a very clear implied duty, resting on the Executive, to return bills if in any way possible for him to restore them to the actual or potential possession and control of the Congress. The implication is as clear and compelling as any other implied power or duty under the Constitution. Unreturned, they become laws in ten days;

returned, Congress has final legislative power over them. By this clear implication a compelling duty is imposed on the President to return its bills to an existing and continuing Congress if in any way possible to do so, that the Congress may again have and exercise its legitimate control over the same. The court below erred in not giving consideration, weight and effect to this obvious implication, and in not holding that the adjournment intended by the constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill and of subsequent action thereon by the Congress.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

As shown in the previous argument the sole exception, when unreturned bills fail to become laws in ten days, is not when a return is prevented by a recess of "that House," but when return is prevented by adjournment of "the Congress." There is no material distinction, except of duration and nomenclature, between adjournments for "the remainder of the day" and adjournments of an intermediate sitting or first session of a Congress. If return can and must be made to "that House" in the last hours of the tenth day, though recessed for the day, the Congress being yet in session, then a like return may be made when both Houses are in temporary recess, where the same Congress again sits after the adjournment.

The construction ten "legislative days," if adopted, permits the return on the tenth day falling in active legislative session when the Congress sits after the adjournment, and

precludes any prevention of return by adjournment other than final. There is a clear distinction between the effect of a temporary and of a final adjournment upon the ability of the President to make a return; and there is a wide difference between the capacity of an existing recessed Congress and of a dissolved and finally adjourned Congress to receive and act upon bills the President would return to them with objections. Recess adjournments, in reasonable construction, neither prevent a return nor reconsideration of legislation; final adjournment renders any return and any reconsideration impossible. It was error of the lower court not to perceive, consider and make such distinctions; the court also failed to make the distinction that the exception is not predicated on adjournment; it is predicated on a prevention of a return and the resultant defeat of the revisionary purpose of the veto clause by adjournment.

8. **The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.**
9. **The court below erred in the absence of decisions by this or other Federal courts in not giving due consideration to the construction of identical or similar language in State constitutions by the highest courts of such states.**

The Executive precedents of construction relied on by the lower court (R. p. 65, 66) are wholly unilateral constructions of a constitutional provision in the correct construction of which the Congress has an equal interest and right. The protesting voice of the Congress against what is claimed to be an erroneous and improper construction, and an infringement of its constitutional rights and pre-

rogatives, should have been given equal weight and consideration by the court. In final analysis, it may yet be observed that the power and duty of construction and interpretation of the Constitution is vested in the Judicial branch of the government, not in the Executive or in the Congress, and that the plain, unmistakable language of the instrument and the clear intent and purpose of those who framed and adopted it are to be recognized and preserved by the Court, regardless of contrary interpretation by the President or the Congress, and are to be changed only by formal articles of amendment solemnly adopted by the several States in the method prescribed by the instrument.

These precedents in construction (Executive and Congressional) do not have the weight of decisions of a Federal Court, yet considering the quasi-judicial character of the opinions of the Judiciary Committees of the Senate and House, and the construction of identical or similar language by the highest courts of several States, the lower court clearly erred in disregarding these dignified aids to correct construction and in considering, following and adopting only precedents of Executive construction which are opposed by these legislative precedents, by these State decisions, and by the whole policy, spirit, intent and language of the Constitution.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

A fundamental rule for construction is that it must be in harmony with and not in derrogation of the other rights and powers conferred by the instrument, and that,

unless the construction is harmonious, it should be rejected for another construction that will give harmony and effect to all the provisions.

The construction presented and urged by petitioners alone satisfies these requirements, and the construction adopted by the court below was clearly erroneous, for the reasons that it clearly infringes upon the rights of Congress and that of the Houses thereof to adjourn temporarily without jeopardizing their legislation theretofore presented to the President, or forfeiting their constitutional right to repass it by two-thirds vote notwithstanding any objections the President may have thereto, or surrendering to the Executive their sole and exclusive power of legislation, negative as well as affirmitive, vested in them by the Constitution.

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President, with his objections.

Under the construction ten legislative days, return of the bill, S. 3185, could have been made within the constitutional period when the 69th Congress resumed its active legislative sessions on December 6, 1926. Under the construction ten calendar days, return could have been made within the constitutional period by delivery of the bill and any Executive objections, to the President, the Secretary, or a journal clerk of the Senate during the first two days of its summer recess, to wit: on July 4th or 5th, 1926, the 9th and 10th days (Sundays excepted) after the bill was presented to the President on June 24, 1926. Temporary adjournment of the Congress in no way prevented such return or defeated the purpose thereof.

Such return would permit the Congress to receive, know and to pass on revisionary objections to the bill and to enjoy the full exercise of all their Constitutional rights and privileges without infringement or curtailment by the Executive.

CONCLUSION

The purpose of the veto clause was to permit revision of legislation. The purpose of the ten-day clause attached thereto was to prevent delays or defeat of bills through the President's possession of and failure to return legislation. The purpose of the exception clause was to preclude Congress from defeating the revisionary purpose of the veto clause by other than final adjournment before the expiration of the ten days allotted therefor. The constant intent of the Constitution was that sole and final power over the legislation rests in the Congress up to its final adjournment.

The expressed will of the Constitution is that bills not signed or returned in ten days become laws.

The only exception is not "unless the Congress adjourn." The exception is "unless the Congress prevent the return by their adjournment." It is the clear intent and purpose that the President must return the bill if possible for him to do so. The impelling rule of construction is that the words shall be reasonably construed in harmony with and not in conflict with other provisions or in derrogation of other rights and powers specificially granted.

The construction urged by petitioners, i. e.., either ten legislative days, permitting return when the same Congress again sits after the recess; or, ten calendar days, requiring a return by delivery of the bill to proper officers of "that House" during its temporary adjournment, satisfies all the

requirements. That adopted by the lower court fails and must be rejected by the same tests.

Final adjournment alone, in reasonable construction, prevents return and reconsideration, and defeats the purpose of the veto clause. In event of temporary recess, return may yet be had. Restoration of the bill to the potential control of the Congress may be made by return to that House in recess, or when again sitting after the adjournment. This satisfies all reasonable requirements and is in harmony with the policy, spirit and intent of the instrument.

The construction adopted by the lower court fails, and must be rejected by the same tests. The adjournment of the 69th Congress on July 3, 1926, was not a final adjournment and did not relieve the President of his duty to make return of the bill in ten days (legislative or calendar) and did not prevent the return of the bill within the true meaning and intent of the Constitution. The bill S. 3185 is therefore an existing law, not having been returned to Congress within either ten calendar or ten legislative days after it was presented to the President on June 24, 1926.

For these reasons it is respectfully submitted that the decision of the Court below should be reversed and the case remanded thereto with instructions to vacate the judgment of April 16, 1928, and enter an order overruling the demurrer and requiring defendant to answer to the petition.

Respectfully submitted,

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